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No. 10-318

Supreme Court, U.S.
FILED
OCT 22 2010
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In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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October 19, 2010

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SUMMARY OF POSITION

The Petitioner has consistently maintained throughout this litigation that Respondent's counsel has engaged in systemic misrepresentation of facts and evidence in this case. The trial and appellate courts have been unsympathetic, disregarding Petitioner's consistent complaints of Attorney Misconduct, and at summary judgment, accepted the moving party/Respondent's version of facts.

Left with no recourse, Petitioner filed a Formal Complaint of Attorney Misconduct with the Chief Judge of the Circuit Court, which had remained unanswered through denial of rehearing and extended time period of filing the Petition with this Court. Petitioner's pending Complaint of Attorney Misconduct with the Chief Judge of the Circuit Court, pending Motion to Set Aside the District Court's GRANT of summary judgment for Fraud on the Court, and only several issues of misconduct within the lower courts were raised within Petitioner's Brief with this Court.

During the course of filing the instant Petition with this Court, upon consideration of the Petitioner's Complaint of Attorney Misconduct *and* the documentation offered in support thereof the Chief Judge of the Circuit Court determined Petitioners Complaint to be sufficiently meritorious to ORDER actions of Respondent's Counsel of Record *in this case* be brought before *disciplinary board* of the Supreme Court of Ohio.

As this case was decided on summary judgment where courts are now *required* to draw inferences most favorable to the Petitioner. The Chief Judge's ORDER provides reasonable and objective

support that Respondent's motion for summary judgment had *not* been *properly* supported, rendering the lower courts prior AFFIRM and GRANT of summary judgment to the Respondent no longer tenable.

The Chief Judge's recent ORDER now also constitutes substantial, objective evidence supporting this Petition seeking protection for employment Civil Rights litigants across the nation from employers' abusive litigation practices throughout the complaint processes. The Petitioner now respectfully calls upon the United States Supreme Court to seize upon this modern day "David and Goliath" confrontation as an unequaled opportunity to send an unambiguous message to employers across the country, that the United States will not tolerate an employer's exercise of abusive litigation practices as a means to defeat important employment Civil Rights policies.

It is but for the lower court's *untimely* initiation of remedy for *abusive* litigation practices in this "David and Goliath" employment Civil Rights case, that now presents this uniquely situated Court with landmark opportunity to vindicate an important congressional policy by guaranteeing employees across the nation a "Right to be Heard" against discriminatory employment practices.

ARGUMENT

I. McKenna's Pending Complaint of Attorney Misconduct

The Petitioner Kevin H. McKenna (McKenna) raised the issue of McKenna's pending Formal Complaint of Attorney Misconduct (Complaint) at pages 16-18 and pages 48-49 of Petitioners Brief,

against Brian E. Dickerson and Jonathan R. Secrest (named Attorneys) as Respondent Nestle Purina PetCare Co.'s (Nestle) counsel of record in this case. McKenna's Complaint against the named Attorneys was filed with Chief Judge Alice M. Batchelder (Chief Judge Batchelder) of the United States Court of Appeals for the Sixth Circuit (Circuit Court) on the 11th day of January 2010 and docketed with the Circuit Court as Case No. 10-9501 on the 2nd day of February 2010. McKenna's Complaint had not been reviewed Chief Judge Batchelder at the time McKenna's Petition was filed with this Court on the 26th day of August 2010.

The requisite *clear and convincing evidence* offered in support of McKenna's Complaint (documentation) *directly* evidences a few of the many instances of Fraud on the Court by the named Attorneys in this case. *Significantly* those instances of misconduct *include* Subornation of Perjury, Subornation of Evidence Tampering *as attested to within Affidavit Statements* offered in support of Nestle's motion for summary judgment, now further referenced and reiterated before this Court within Nestle's Brief in Opposition. Those issues of named Attorneys' Misconduct go right to the heart of the legitimacy of Nestle's representations to this Court, the lower Courts, and resulting judgment(s) *in this case*. Suffice to say, and unsurprisingly, McKenna does *not* stipulate to any of Nestle's representation(s) of alleged version of facts and evidence.

II. ORDER by Chief Judge of the Circuit Court

Pursuant to 6 Cir. R. 46(b)(D) Chief Judge Batchelder has now completed initial review of McKenna's Complaint *and* the documentation offered in support thereof. Significantly, 6 Cir. R. 46(b)(D)(i) *requires* that, if the chief judge determines that the complaint is *without merit* or does not warrant action by the Court, the complaint *shall* be dismissed by order of the chief judge. Upon expressly stated consideration of the documentation offered in support McKenna's Complaint, Chief Judge Batchelder did *not* determine that McKenna's Complaint was without merit, as is evidenced by the fact that Chief Judge Batchelder did *not* dismiss McKenna's Complaint as is required by 6 Cir. R. 46(b)(D)(i).

On the 29th day of September 2010, upon consideration of McKenna's Complaint *and* the documentation offered in support thereof, Chief Judge Batchelder determined that McKenna's Complaint was *sufficiently meritorious* to have issued an ORDER pursuant to 6 Cir. R. 46(b)(D)(iii) that the named Attorneys' misconduct *in this case* be brought before disciplinary board of the Supreme Court of Ohio (Reply Appendix, pp. 1-3).

III. "SUMMARY JUDGMENT"

To Be Clear: This case was decided on summary judgment and has *not* been submitted to a judge or jury for trial, and is well established there *should* not yet have been factual findings.

> "As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs

> substantially from [*Petitioner's*] version. When things are in such a posture, courts are *required* to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam); *Saucier*, supra, at 201, 121 S.Ct. 2151." (*emphasis* added) *Scott v. Harris*, 127 S. Ct. 1769 at 1774-1775 (2007).

a. **As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury.**

Nestle's numerous references to Petitioners' Appendix of Orders and Opinions of the lower courts throughout Respondent's Brief in Opposition citing alleged *findings of fact* by the lower courts, merely highlights the unlawful *pseudo bench-trial* factual findings *at summary judgment* by the lower courts. Furthermore, Chief Judge Batchelder's recent ORDER referring named Attorneys' misrepresentation of facts and evidence *in this case* before disciplinary board of the Supreme Court of Ohio, further emphasizes the lower courts reliance on Nestle's version of facts as woefully misplaced.

b. **Respondent's version of events (unsurprisingly) differs substantially from [*Petitioner's*] version.**

As McKenna has consistently maintained throughout this litigation and accordingly reiterated on page 42 of McKenna's Petition to this Court, and repeats again here and now: "To be Clear: **McKenna only stipulates to the NAMES in this case are**

correct". If deemed material by this Court for purposes of this Petition, a detailed Petitioners version of events is on record with the Circuit of Appeals - Doc: 00615599546 Filed: 06/25/2009 Pages: 11-14; *Id.* Pages: 17-34.

c. **Courts are *required* to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion.".**

i. **Nestle's Recent Argument Regarding Chief Judge Batchelder's ORDER Before the District Court**

In light of that *extremely well-settled* summary judgment standard reiterated by this Court in *Scott v. Harris,* that courts are *required* to draw inferences in light most favorable to McKenna; recent argument proffered by the named Attorneys on the 1st day of October 2010 before the District Court serves as effective concession that Chief Judge Batchelder's ORDER establishes the GRANT, and AFFIRMED summary judgment in favor of Nestle is no longer tenable.

> "Accordingly, the argument that Chief Judge Batchelder determined McKenna's Complaint lacks reasonable grounds *is as easily made* as McKenna's argument that the Chief Judge's referral demonstrates his claims possess merit." (*emphasis* added) (Doc #: 184 Filed: 10/01/10 Page: 2 of 3 at ll. 8-11 PAGEID #: 4566).

At summary judgment, where courts are *required* to view, "... *is as easily made*..." in light

most favorable to McKenna, by Nestle's recent argument before the District Court establishes Chief Judge Batchelder determined McKenna's Complaint has merit. Furthermore, that same argument made by named Attorneys before the District Court unsurprisingly disregards 6 Cir. R. 46(b)(D)(i), requiring the chief judge *shall* dismiss complaints determined to be *without merit*, where in this instance Chief Judge Batchelder did *not* dismiss McKenna's Complaint.

ii. **Reasonable Inferences Drawn From Chief Judge Batchelder's ORDER Most Favorable to McKenna.**

Chief Judge Batchelder's ORDER supports reasonable inference(s) at summary judgment in light most favorable to McKenna, such as but not limited to:

1. Documentation offered in support of McKenna's Complaint meets or exceeds the strict "Clear and Convincing Evidence" burden of proof *required* to sustain a formal complaint of Attorney Misconduct by named Attorneys by perpetrating Fraud on the Court, Subornation of Perjury, and Subornation of Evidence Tampering.
2. McKenna's Complaint of Attorney Misconduct regarding charges of Fraud on the Court, Subornation of Perjury, and Subornation of Evidence Tampering have been determined to have merit.
3. Documentation offered in support of McKenna's Complaint substantially supports named Attorneys' acts warrant *criminal prosecution* for misrepresentation of facts and evidence by

perpetrating Fraud on the Court, Subornation of Perjury, and Subornation of Evidence Tampering in support of Nestle's motion for summary judgment.

4. Legitimately draws the veracity of *all* representations of alleged facts and evidence by the named Attorneys offered in support of Nestle's motion for summary judgment into question.
5. Provides substantial *objective* support for McKenna's consistent and adamantly held position, that *only* the NAMES in this case have been fairly adjudicated. (McKenna Petition at page 42: "To be Clear: **McKenna only stipulates to the NAMES in this case are correct**").
6. Nestle's motion for summary judgment was not *properly* made/supported.
7. Nestle *cannot* support a motion for summary judgment absent misrepresentation of facts and evidence in this case.
8. Post-hoc nature of Chief Judge Batchelder's ORDER *with* reference to prior judgments, expressly copied to the District Court Clerk of Courts "Bonini", supports Chief Judge Batchelder determined the named Attorneys' misconduct in this case is material those referenced judgments, now rendering them as untenable.

It shall indeed be a very perverse system of justice that summary judgment is found properly supported by the District and Circuit Courts, while the named Attorneys' Misconduct in obtaining that same summary judgment face criminal prosecution before a state disciplinary board by ORDER of the Chief Judge of the Circuit Court.

IV. Additional Support for Granting the Petition

a. Petitioner's Question No. 1: Should an employment Civil Rights plaintiff *lawfully* be afforded a "Right to be Heard"?

Chief Judge Batchelder's recent ORDER adds substantial and objective support for McKenna's position that employment Civil Rights are easily undermined by an employer's vexatious litigation practices within both the administrative and judicial processes. This highlights the opportunity to vindicate employment civil rights, and insure employment Civil Rights litigants are afforded fair *opportunity* to be heard. Given the vastly *beyond* "David and Goliath" scale of parties in this case, and the scope of the employers misconduct in a Civil Rights proceeding, this case presents an unparalleled opportunity for this Court to vindicate a Congressional policy of the highest priority, make an example of, and substantially deterring future employer misconduct.

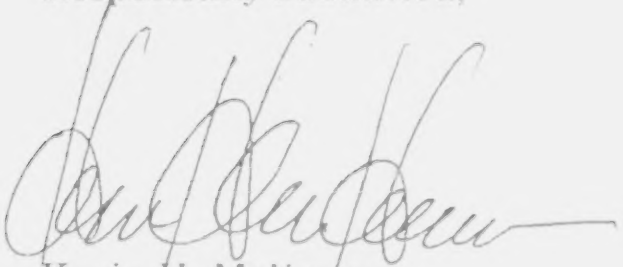
b. Petitioner's Question No. 2: Will the United States Supreme Court *please* grant the *pro se* Petitioner in this case an exercise of this Court's supervisory power?

Remand jurisdiction to the appropriate Court pursuant to final resolution of Chief Judge Batchelder's September 29, 2010 ORDER. Where upon *any* finding of Attorney Misconduct in this case by authority of this Court that default judgment be entered against the Defendant, thereby protecting Petitioner from another round of Respondent's vexatious litigation practices.

CONCLUSION

But for the lower court's *untimely* initiation of remedy for *abusive* litigation practices in this "David and Goliath" employment Civil Rights case, now presents this uniquely situated Court with landmark opportunity to vindicate an important congressional policy by guaranteeing employees across the nation a "Right to be Heard" against discriminatory employment practices.

Respectfully submitted,



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No. 10-9501
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: COMPLAINT OF MISCONDUCT

This matter involves a complaint alleging misconduct on the part of attorneys Brian E. Dickerson and Jonathan R. Secrest, both of whom are members of the bar of this court, and both of whom were counsel of record for the defendant – Appellee in an appeal brought by the complainant from the judgment of the district court in appeal No. 09-3570, *Kevin H. McKenna v. Nestle Purina Petcare Company*. In that case a panel of the court affirmed the judgment of the district court. Mr. McKenna then filed a petition for rehearing *en banc*; no active judge requested a poll on the suggestion that the matter be reheard by the full court, and the petition for rehearing was therefore referred to and denied by, the panel. A series of post-judgment motions were denied in a subsequent order, thus concluding this court's consideration of the case.

The instant complaint has been referred to the Chief Judge of the court for initial review, pursuant to 6 Cir. R. 46(b)(3)(D). Upon consideration of the complaint and the documentation offered in support thereof, the clerk is hereby directed to refer the matter to the Board of Commissioners on Grievances & Discipline of the Supreme Court of Ohio for such action as it determines to be appropriate; 6 Cir. R. 46(b)(3)(D)(iii).

IT IS SO ORDERED.

(s/ Alice M. Batchelder)
Alice M. Batchelder, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: September 29, 2010

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Re: Case No. 10-9501, *In Re: Brian E. Dickerson and*
Originating Case No. : 10-9501

Dear Sir,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Ken A Loomis

Direct Dial No. 513-564-7067

cc. Mr. James Bonini
Brian E. Dickerson
Jonathan R. Secrest

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SEP 29 2010
LEONARD GREEN, Clerk

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IT IS SO ORDERED.

Alice M. Batchelder, Chief Judge